

Internal Revenue Service  
**memorandum**

TL-N-4406-88

CC:TL:TS/MAKEYES

date: **14 JUN 1988**

to: District Counsel, Sacramento W:SAC  
Attn: Jim Clark

from: Director, Tax Litigation Division CC:TL

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subject: TEFRA and NonTEFRA Consents

This memorandum is in response to your March 4, 1988, request for technical advice regarding statute of limitations issues when partnership items have been converted to non-partnership items because of a settlement agreement entered into under section 6231(b) of the TEFRA partnership provisions.

Issues

1. Is a consent to extend the period of limitations (generally a Form 872 or Form 872-A) solicited under I.R.C. § 6501(c)(4), sufficient to extend the period of limitations for items converted from partnership items to non-partnership items as a result of settlement entered into after the expiration of section 6501 period of limitations, but for the consent extending the period?

2. Is the consent described in issue 1 sufficient to cover affected items adjustments after the settlement of partnership item adjustments?

3. If the consent described above is sufficient, should the Service assess as soon as possible, and no later than one year after the settlement agreement?

4. Can the one year period for assessment under section 6229(f) be extended under either section 6229(b) or section 6501(c)(4)?

5. If the period of limitations under section 6501(a) is still open when a settlement agreement for partnership items is signed, can a consent under 6501(c)(4) extend the period of limitations for the converted items?

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### Conclusion

We disagree technically with your conclusion that the consents would be insufficient to cover the converted items in the first and second issues. Although it is not absolutely clear, we believe that the consents should be sufficient to extend the period of limitations under section 6501(a). The critical factor in determining whether the consents are sufficient to cover these converted items is the language used in the consent. As long as the consent is unrestricted, then the converted items should be covered under the consent. Even so, we do not recommend extending the period for assessment beyond the one year period specified in section 6229(f). As you are aware, this issue has not been litigated and there is no point in risking loss of revenue to the Government should the courts decide the consents do not apply.

We agree with your conclusion in the fourth issue, that section 6229(f) can not be extended beyond the one year period. There is no specific provision in the code providing for the period to be extended.

As to the fifth issue, the answer is not clear, but we believe the consent would be sufficient to cover converted items. Again, as this issue has not been litigated there could be hazards in extending the period beyond the one year period specified in section 6229(f). Therefore, we do not recommend obtaining a consent for this purpose as a normal course of action.

### Facts

In your memorandum you propose two hypothetical situations. In the first instance, taxpayer invests in a TEFRA partnership. Taxpayer also has other nonpartnership items on his return. Taxpayer signed a consent to extend the period of limitations under section 6501(c)(4), prior to the expiration of section 6501(a). In your example, you did not specify if the consent was restricted or unrestricted, but to cover these converted items we believe the consent must be unrestricted. After the consent is signed for nonpartnership items, the period of limitations under section 6501(a) expires, except for those items covered under the consent. The TMP then signs a consent for the extension of section 6229(a). A settlement agreement is entered into resolving the partnership items.

In your second hypothetical the situation is the same, except no consent had been executed. The statute is open under section 6501(a) at the time the settlement agreement for partnership items is executed. It is then decided a consent needs to be entered into for the nonpartnership items.

## Discussion

### General Introduction

There are two statutes controlling the assessment of tax applicable to partnership and affected items, section 6501(a) and section 6229(a). I.R.C. § 6501 provides the general rule that the period for assessment of any tax imposed by any provision of the code will not expire before three years from the date the return was filed. For instance, the return in question would be the partner's 1040. Section 6229(a) provides that the period for assessing any tax imposed by Subtitle A which is attributable to a partnership item shall not expire before the date which is 3 years from date the partnership return is filed.

The TEFRA statute of limitations provision also provides a section for items that become nonpartnership items. Section 6229(f) provides a one year period for assessment for items that have become nonpartnership items by reason of section 6231(b). Section 6229(f) provides that:

If, before the expiration of the period otherwise provided in this section for assessing any tax imposed by subtitle A with respect to the partnership items of a partner for a taxable year, such items become nonpartnership items by reason of one or more of the events described in subsection (b) of section 6231, the period for assessing any tax imposed by subtitle A which is attributable to such items (or any item affected by such items) shall not expire before the date which is one year after the date on which the items become nonpartnership items.

Section 6231(b)(1)(C) provides that partnership items shall become nonpartnership items when the Secretary enters into a settlement agreement with respect to such items.

I. & II. Can a consent signed pursuant to section 6501(c)(4) extend the period of limitations for partnership and affected items converted to nonpartnership items, if section 6501(a) would have expired prior to the conversion, but for the consent obtained?

Under the facts you describe, a settlement agreement is entered into with respect to partnership items. These partnership items then become nonpartnership items to the partner signing the settlement agreement. See Section 6231(b)(1)(C). When that happens section 6229(a) will no longer apply to these

converted items as they are no longer partnership items. The only two provisions which could apply are sections 6501(a) and 6229(f).

In your first hypothetical, the usual statute of limitations under section 6501(a) would have expired, except for the fact that a consent has been executed pursuant to section 6501(c)(4). This general consent was signed prior to the taxpayer entering into the settlement agreement for partnership items. The consent did not refer to partnership items. See I.R.C. § 6229(b)(2).

It is your position that the converted items are not covered under the consent because the period of limitations under section 6501(a) expired prior to the settlement agreement. Therefore, the only statute protecting those partnership and affected items at the time was section 6229(a). You further reason that since the consent did not refer to partnership items, that once these same items are converted, they can not be covered by the consent.

We reach a different conclusion. Although we would agree that it is not absolutely clear if the consents are sufficient to cover the converted items, we believe these items could be covered under the consent, depending upon the terms of the consent.

If an unrestricted consent is signed, it is our position that section 6501(a) has not expired due to the consent executed pursuant to section 6501(c)(4), extending the period of limitations. Once the partnership items are converted to nonpartnership items, they are still covered by operation of law by section 6501(a), if that statute of limitations is still open. If that statute of limitations is not open, these items would be protected only under section 6229(f). We believe the key factor in determining whether these converted items are covered by section 6501(a) is whether an unrestricted consent was signed by the taxpayer. We would emphasize that the Form 872 or 872-A must have been an unrestricted consent. If the consent was limited to the charitable contribution issue, or if it specified particular issues, we do not believe the statute under section 6501(a) would be open for the converted items. Because there has been no litigation on this issue, there is a risk that a Court may find that only the one year statute of limitations under section 6229(f) applies to these converted items. Therefore, although it is our position that the converted items are covered under the consent, we do not think it wise to rely on such an extension if it is at all possible to take the necessary action within the one year period provided for in section 6229(f).

This same rationale applies to affected items. Once the settlement agreement is entered into, the partnership items become nonpartnership items and the affected items are converted from TEFRA. Section 6231(a)(5) defines an affected item as "any item to the extent that such item is affected by a partnership item." When the partnership items are no longer partnership items, then it follows that the affected items are treated the same as converted partnership items. Since these items are now nonpartnership items, the consent should cover the converted affected items. However, we would not extend the assessment beyond the one year period specified in section 6229(f) for the same reasons noted for the converted partnership items.

At the end of your memorandum you address the proper treatment of affected items that require partner level determination, such as a penalty. You advise that notice of deficiency for such items be issued within the one year period provided by section 6229(f). As you properly noted, the issuance of notice on the penalty issue under section 6230(a)(2)(C) would not prevent the issuance of the notice for deficiency for nonpartnership issues (i.e. the charitable contribution in your hypothetical). We agree that if it appears that a notice of deficiency cannot be issued within the one year time period, it would be better to issue two separate notices.

III. If consents are sufficient, should the Service assess as soon as possible, and no later than one year after the settlement agreement?

As to your third issue, we agree with your conclusion that, even if the consents are sufficient to extend the period of limitations, the assessment should take place within the one year period following the settlement agreement. We also agree that a notice of deficiency for affected items requiring partner level determinations should be issued within one year period after the settlement agreement was executed. As noted, this point has not been litigated and there is no reason to risk loss of revenues to the Government on the basis of a position which has not been tested in the Courts.

Furthermore, once a settlement agreement has been entered into there is no valid reason for withholding assessment for deficiencies attributable to converted partnership items. An increased tax is assessed as a computational adjustment. See, Temp. Treas. Reg. § 301.6231(a)(6)-1T(a). An affected item that does not require determinations at the partner level can also be assessed as a computational adjustment. Id.

IV. Can the one year period for assessment under section 6229(f) be extended by section 6229(b) or section 6501(c)(4)?

We agree that section 6229(f) cannot be extended beyond the one year period. It is our position that, since there is no specific provision in the code for extending the period of assessment under section 6229(f), it cannot be done. Both section 6229(a) and section 6501(a) statute of limitations can be extended by consent. As you noted in your memorandum, the specific provision for extending the statute of limitations for section 6229(a) is section 6229(b). Section 6229(a) applies only to partnership and affected items. The statute of limitations under section 6229(a) can also be extended by a consent obtained pursuant to section 6501(c)(4), but only if that consent specifically makes reference to partnership items. See section 6229(b)(2). Section 6501(a) period of limitations can be extended by a consent obtained pursuant to section 6501(c)(4). Therefore, the only provision in the Code for extending the statute of limitations for nonpartnership items is section 6501(c)(4). Section 6501(c)(4) provides:

Extension by Agreement - Where, before the expiration of the time prescribed in this section for the assessment of any tax imposed by this title, except the estate tax provided in chapter 11, both the Secretary and the taxpayer have consented in writing to its assessment after such time, that tax may be assessed at any time prior to the expiration of the period agreed upon. The period agreed upon may be extended by subsequent agreements in writing made before the expiration of the period previously agreed upon.

By its terms section 6501(c)(4) applies to section 6501(a). Therefore, since section 6501(c)(4) only applies to section 6501(a) by its terms or to section 6229(a) because of section 6229(b)(2)), it does not apply to 6229(f).

V. If the period of limitations under section 6501(a) is still open when a settlement agreement for partnership items is signed, can a consent under section 6501(c)(4) extend the period of limitations for the converted items?

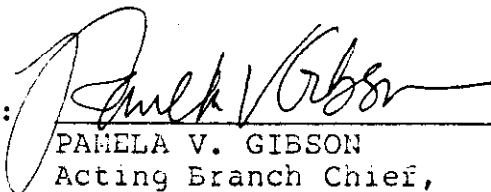
We agree with your conclusion that an unrestricted consent under section 6501(c)(4) would probably be sufficient to cover the converted items and extend the period of limitations in the situation where the section 6501(a) is open when the settlement agreement converting the partnership items to non partnership

items is entered into. Here again, our rationale would parallel that already stated for the first two issues. You find a difference in this situation since section 6501(a) is clearly open at the time the items are converted. We believe if an unrestricted consent was signed in the other situation, section 6501(a) was open. We do not believe there should be any difference between this situation and one where section 6501(a) was extended by a consent, unless the consent is restricted.

While it is our position that the statute of limitations under section 6501(a) should be extended by the consents entered into in your factual situations, we strongly recommend against relying on a consent extending the period of assessment beyond the one year period, unless absolutely necessary, since there is no precedent regarding this issue and there is a risk that our position will not be sustained. No Court has yet addressed the validity of such extensions. These consents could also create tracking problems as well as other administrative problems.

Should you have any questions regarding this memorandum please contact Marsha Keyes, Tax Shelter Branch at FTS 566-4174.

MARLENE GROSS

By:   
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